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No. 87-906

In the Supreme Court of the United States

OCTOBER TERM, 1987

JOHN W. ROBERTS, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

10 pp

TABLE OF AUTHORITIES

Page

Cases:

Barney v. *United States*, 568 F.2d 116 (8th Cir. 1978) 5
Couch v. *United States*, 409 U.S. 322 (1973) 6
DiBella v. *United States*, 369 U.S. 121 (1962) 2
Gluck v. *United States*, 771 F.2d 750 (3d Cir. 1985) 5, 7
Grand Jury Proceedings, In re, 716 F.2d 493 (8th Cir. 1983) 3
Hill v. *United States*, 346 F.2d 175 (9th Cir.), cert. denied, 382 U.S. 956 (1965) 3
Imperial Distributors, Inc. v. *United States*, 617 F.2d 892 (1st Cir.), cert. denied, 449 U.S. 891 (1980) 3
Kurshan v. *Riley*, 484 F.2d 952 (4th Cir. 1973) 5
Lawhon v. *United States*, 390 F.2d 663 (5th Cir. 1968) ... 5
Murphy v. *Hunt*, 455 U.S. 478 (1982) 6
St. Pierre v. *United States*, 319 U.S. 41 (1943) 4
United States v. *Aquinas College Credit Union*, 635 F.2d 887 (6th Cir. 1980), cert. denied, 450 U.S. 1042 (1981) . 4-5
United States v. *Arthur Andersen & Co.*, 623 F.2d 720 (1st Cir.), cert. denied, 449 U.S. 1021 (1980) 5, 6
United States v. *Blue*, 384 U.S. 251 (1966) 5
United States v. *Deak-Perera Int'l Banking Corp.*, 610 F.2d 89 (2d Cir. 1979) 5
United States v. *First American Bank*, 649 F.2d 288 (5th Cir. 1981) 4, 5
United States v. *First Family Mortgage Corp.*, 739 F.2d 1275 (7th Cir. 1984) 6
United States v. *Kis*, 658 F.2d 526 (7th Cir. 1981), cert. denied, 455 U.S. 1018 (1982) 4, 5, 6
United States v. *Miller*, 425 U.S. 435 (1976) 6
United States v. *Munsingwear, Inc.*, 340 U.S. 36 (1950) .. 5
United States v. *Premises Known as 608 Taylor Ave.*, 584 F.2d 1297 (3d Cir. 1978) 3
United States v. *Regional Consulting Services*, 766 F.2d 870 (4th Cir. 1985) 3
United States v. *Ryan*, 402 U.S. 530 (1971) 6
United States v. *Sherlock*, 756 F.2d 1145 (5th Cir. 1985) .. 5

Cases—Continued: Page

United States v. *Silva & Silva Accountancy Corp.*, 641 F.2d 710 (9th Cir. 1981) 4
United States v. *Sweet*, 655 F.2d 54 (5th Cir. 1981) 6
United States v. *Trails End Motel*, 657 F.2d 1169 (10th Cir. 1981) 4
Vesco v. *SEC*, 462 F.2d 1350 (3d Cir. 1972) 7
Warden v. *Hayden*, 387 U.S. 294 (1967) 3
Weinstein v. *Bradford*, 423 U.S. 147 (1975) 5

Rule:

Fed. R. Crim. P. 41(e) 1-2, 3, 4

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MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner contends that the court of appeals had jurisdiction over his appeals from an order dismissing his action for the return of property and the suppression of evidence and an order enforcing three IRS summonses.[1]

1. As part of an IRS investigation of petitioner, Special Agent Randy Taylor visited the accounting firm of Chapel & Ward, and requested access to documents relating to petitioner. Chapel & Ward voluntarily gave Agent Taylor workpapers, books and other records (Pet. App. B11). The IRS made copies of those documents and returned to the accountants all original documents except a computer printout and a workpaper that belonged to the accountants (*id.* at A3). Petitioner then filed an action in the district court pursuant to Federal Rule of Criminal

[1] Petitioner Roberts was the only appellant in the court of appeals (Pet. App. B1, C2), even though several of his controlled companies were also plaintiffs in the action for the return of property and the suppression of evidence (*id.* at B6).

Procedure 41(e) to have the copies delivered to him and to suppress any use of the information by the IRS. The district court dismissed, holding that petitioner had no legitimate expectation of privacy in the records in the hands of his accountants and that petitioner's constitutional rights had not been violated (Pet. App. B15, B20).

In a separate action brought by petitioner, the district court ordered enforcement of three IRS administrative summonses that required the production of bank records relating to petitioner and required accountants Chapel and Ward to give testimony pertaining to petitioner's tax liabilities (Pet. App. C12-C15). Both the district court (*id.* at C9) and the court of appeals (*id.* at C1) denied motions for a stay of the district court's enforcement order. Before briefs were filed in the court of appeals, all three summoned parties complied with the IRS summonses (*id.* at A2).

The court of appeals dismissed petitioner's two appeals (Pet. App. A1-A4). The court held that it had no jurisdiction over petitioner's appeal from the order dismissing his Rule 41(e) action because an order denying the suppression of evidence is interlocutory. The court dismissed petitioner's appeal from the order enforcing the IRS summonses on the ground of mootness; all summoned parties had complied with the summonses.

2. The court of appeals correctly dismissed petitioner's appeal from the order dismissing his Rule 41(e) action. It is well settled that the dismissal of a Rule 41(e) action is immediately appealable "[o]nly if the [action] is solely for return of property and is in no way tied to a criminal prosecution *in esse* * * *." *Dibella* v. *United States*, 369 U.S. 121, 131-132 (1962). Petitioner's action failed the first part of the two-part *DiBella* test because it sought the suppres-

sion of evidence and was thus not solely for the return of property (Pet. App. A3-A4).

Petitioner maintains (Pet. 31-35) that there is a conflict in the circuits over the precise meaning of the first part of the *DiBella* test. Petitioner notes that some circuits inquire into the motive underlying a Rule 41(e) action to determine whether its "primary" purpose was to obtain the return of property (in which case its dismissal is appealable) or to suppress the government's use of evidence. See, *e.g.*, *United States* v. *Premises Known as 608 Taylor Ave.*, 584 F.2d 1297, 1300 (3d Cir. 1978). Petitioner contends that these decisions conflict with the Fourth Circuit's opinion in *United States* v. *Regional Consulting Services*, 766 F.2d 870 (1985). The Fourth Circuit, however, recognized no such conflict. It carefully noted in *Regional Consulting Services* that the Rule 41(e) movants in that case did not prove that "the primary purpose of their motion" (766 F.2d at 873 n.6) was the return of records. Thus we believe that no conflict in the circuits has arisen with respect to the first part of the *DiBella* test.

In any event, petitioner's motion under Rule 41(e) specifically requested suppression as a remedy (Pet. 21-22). Petitioner also sought to obtain copies of documents that Agent Taylor obtained from and then returned to Chapel & Ward. But a motion to obtain copies of returned records is nothing more than a motion to suppress the contents of those records. See *Warden* v. *Hayden*, 387 U.S. 294, 305 (1967); *Imperial Distributors, Inc.* v. *United States*, 617 F.2d 892, 895-896 (1st Cir.) (dismissing appeal), cert. denied, 449 U.S. 891 (1980); *Hill* v. *United States*, 346 F.2d 175 (9th Cir.) (dismissing appeal), cert. denied, 382 U.S. 956 (1965). Compare *In re Grand Jury Proceedings*, 716 F.2d 493 (8th Cir. 1983) (denial of Rule 41(e) motion appealable because motion primarily sought return of original documents that were

vital to movant's operation of business). Accordingly, petitioner's Rule 41(e) action was primarily, if not solely, designed to suppress the government's use of evidence. The district court's dismissal of his action therefore was not appealable under any circuit's reasoning.

This case does not present any issue concerning the second part of the *DiBella* test (Pet. 34-48). Petitioner does not challenge the accepted view that the dismissal of a Rule 41(e) action is appealable only if both parts of the test are satisfied. Accordingly, because petitioner's appeal does not meet the first part of the test, the court of appeals properly did not reach the question whether petitioner's Rule 41(e) action was tied to a criminal prosecution.

3. The court of appeals also correctly dismissed as moot petitioner's appeal from the order enforcing the IRS administrative summonses. A case becomes moot when the controversy between the parties ceases to exist so that the court may not grant effective relief. See, *e.g.*, *St. Pierre* v. *United States*, 319 U.S. 41 (1943). In a summons-enforcement proceeding, the government seeks only to obtain access to the summoned information; the party challenging the summons hopes to prevent that access. Once the summoned parties have complied, as in this case, the government has achieved its objective and there is no relief that a court can grant the opposing party. For that reason, all but one of the courts of appeals that have considered the question have held that compliance with an IRS summons renders moot an appeal from an order enforcing the summons.[2]

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[2] See, *e.g.*, *United States* v. *Kis*, 658 F.2d 526 (7th Cir. 1981), cert. denied, 455 U.S. 1018 (1982); *United States* v. *Trails End Motel*, 657 F.2d 1169 (10th Cir. 1981); *United States* v. *First American Bank*, 649 F.2d 288 (5th Cir. 1981); *United States* v. *Silva & Silva Accountancy Corp.*, 641 F.2d 710 (9th Cir. 1981); *United States* v. *Aquinas College Credit Union*, 635 F.2d 887 (6th Cir. 1980), cert. denied, 450 U.S.

The Third Circuit's decision in *Gluck* v. *United States*, 771 F.2d 750 (1985), is the only contrary circuit authority. In *Gluck*, the Third Circuit reasoned that a case is not moot after compliance with a summons because the court can order the suppression of illegally obtained evidence in any future civil or criminal proceeding. This reasoning is faulty. See *United States* v. *Sherlock*, 756 F.2d 1145, 1147 (5th Cir. 1985). As the Seventh Circuit correctly observed in *United States* v. *Kis*, "[i]t would be highly speculative" to rule on the legality of a summons "for there is no guarantee that the Government will ever seek to use" the summoned evidence (658 F.2d at 533). Thus a ruling on the merits in this case would simply be an "advisory opinion." *Lawhon* v. *United States*, 390 F.2d 663 (5th Cir. 1968) (per curiam). Petitioner may obtain a ruling on the legality of the IRS summonses by way of a suppression motion in the event that there is a future trial.[3] Cf. *United States* v. *Blue*, 384 U.S. 251, 255 (1966).

1042 (1981); *United States* v. *Arthur Andersen & Co.*, 623 F.2d 720 (1st Cir.), cert. denied, 449 U.S. 1021 (1980); *United States* v. *Deak-Perera Int'l Banking Corp.*, 610 F.2d 89 (2d Cir. 1979); *Barney* v. *United States*, 568 F.2d 116 (8th Cir. 1978); *Kurshan* v. *Riley*, 484 F.2d 952 (4th Cir. 1973). Contrary to petitioner's suggestion (Pet. 51), these decisions are not limited to a case where a taxpayer, as distinguished from a third party, complies with the summons. See, *e.g.*, *United States* v. *First American Bank*, *supra*; *United States* v. *Deak-Perera Int'l Banking Corp.*, *supra*; *Barney* v. *United States*, *supra*.

[3] Under settled precedent, the district court's enforcement order in this case will be vacated because the case became moot before the court of appeals ruled on the merits. Such an order is required "to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences[,]" and "clears the path for future relitigation of the issues between the parties." *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 40-41 (1950); see also *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975).

Petitioner's appeal from the order enforcing the IRS summonses does not remain justiciable under the doctrine that claims remain alive if they are "capable of repetition, yet evading review." *Murphy* v. *Hunt*, 455 U.S. 478, 482 (1982); see *United States* v. *Kis*, 658 F.2d at 533. First, there is nothing in the record to support a finding that "there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again" (*Murphy* v. *Hunt*, 455 U.S. at 482). Even if new summonses are issued and enforced, the affected parties can obtain full appellate review by obtaining a stay or by means of a contempt citation. See *United States* v. *First Family Mortgage Corp.*, 739 F.2d 1275, 1277-1278 (7th Cir. 1984); *United States* v. *Kis*, 658 F.2d at 533; *United States* v. *Sweet*, 655 F.2d 54, 55 (5th Cir. 1981). This Court has recognized that a party's risking contempt may, at times, be the only way to obtain full appellate review of an adverse order.[4] See, *e.g.*, *United States* v. *Ryan*, 402 U.S. 530, 533 (1971). Accordingly, the court of appeals correctly dismissed as moot petitioner's appeal in the summons-enforcement case.

Finally, we believe that this Court's review of the circuit conflict on the mootness question is not necessary at this

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[4] Petitioner cites *United States* v. *Arthur Andersen & Co.*, 623 F.2d 720 (1st Cir.), cert. denied, 449 U.S. 1021 (1980), for the proposition that accountants cannot reasonably be expected to risk contempt in a summons-enforcement case (Pet. 60). In fact, the court noted in *Andersen* (623 F.2d at 724) that an accounting firm has a "sufficient incentive" to protect its client's interests because unauthorized disclosures hinder the firm's ability to obtain information. In any event, petitioner's claims can be asserted when evidence is sought to be used against him and provide no basis for interference with the IRS's investigation of third-party records. Cf. *United States* v. *Miller*, 425 U.S 435 (1976); *Couch* v. *United States*, 409 U.S. 322 (1973).

time. As Judge Garth noted in dissent in *Gluck* (771 F.2d at 759-760), the Third Circuit's holding on mootness in that case conflicts with the prior Third Circuit decision in *Vesco* v. *SEC*, 462 F.2d 1350 (1972). Judge Garth has urged that this intracircuit conflict be resolved by the court en banc (771 F.2d at 761). There is substantial summons-enforcement litigation within the Third Circuit, and the government is interested in attempting to persuade that court to agree with the unanimous view of other circuits. Thus, the Third Circuit may well have an opportunity soon to reconsider its mootness rule en banc.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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